No. 48299-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In Re the Dependency of S.K.P.

BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENDER ASSOCIATION

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I. Interest of Amicus Curiae

The Washington Defender Association ("WDA") is a non-profit association of over a thousand public defenders, criminal defense attorneys, investigators and others throughout the state of Washington, who are committed to supporting and improving indigent defense.

A primary purpose of WDA is to improve the administration of justice and stimulate efforts to remedy inadequacies in substantive and procedural law that contribute to injustice. For many years, WDA has been involved in issues related to juvenile justice and juvenile representation, providing training for defenders working in the juvenile justice system and advocating for juvenile justice reform. WDA is particularly interested when the justice system fails to protects the rights of children in the context of dependency proceedings. WDA has been granted leave on many prior occasions to file amicus briefs in the appellate courts of Washington State.

The Court's decision in this case has potentially far-reaching implications for dependency representation in this State. The purpose of this brief is to address two issues: first, whether a parent can protect and advocate for the interests of the child in a dependency case, considering that the parent's interests may be substantially different from, and in conflict with, those of the child; and second, whether lack of statutory

standards for appointing counsel for children has resulted in an arbitrary and unfair system in which geography dictates whether a child will receive appointed counsel. Recognizing the child's right to appointment of counsel will eliminate arbitrary geographic disparity and ensure the voices of children are heard in dependency cases.

II. Statement of the Case

WDA adopts the Appellant's statement of the case.

III. Argument

Children in dependency proceedings should be provided independent counsel. Consideration of the child's voice is essential to the fairness and effectiveness of the outcome of dependency proceedings, where the court's decisions will have a profound impact on the child's life and liberty. Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 Cumb. L. Rev. 181, 205 (2014). A child in a dependency proceeding has liberty interests that are different from those of the parents, in both kind and degree, at every stage of the process. The child faces serious risk of erroneous decision-making and irreparable harm in a system that gives the judge broad discretion, provides imprecise standards for exercising that discretion, and relies on other parties, each with their own interests at stake, to describe, if not advocate for, the child's interests during reviews that are separated by many months.

Appointing counsel for the child will improve the dependency system by ensuring the independent interests of children are clearly articulated and defined, supported by advocacy, evaluated in confidence, and presented fully for consideration by the dependency court.

Children in Washington State are at a singular disadvantage in dependency proceedings: they are the only participants who are not entitled to protect their interests through the assistance of appointed counsel throughout the proceedings. The deprivation of counsel in dependency proceedings is striking, considering that the process dictates where the child will live, who will be her family, whether she will be forced to change schools, whether she will participate in the culture of her heritage, and almost every other aspect of her childhood. In a dependency, "[i]t is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." *In re Dependency of MSR*, 174 Wn.2d 1, 16, 271 P.3d 234 (2012).

The interests of a child in a dependency proceeding are not the same as those of the State or the child's parents.

> [I]f a child is not represented by independent counsel, each attorney presents his arguments from the viewpoint of his client, with the child caught in the middle. Beneath each

> side's argument in terms of the best interests of the child, lies the desire to prevail for a client, who is not the child.

Matter of T.M.H., 1980 OK 92, 613 P.2d 468, 470 (1980). Given that "it is the attorneys who generally control the flow of information to the court ..., in terms of protecting the child's best interest, it would be folly to rely on the attorney for the parent." Jennifer Walter, *Averting Revictimization of Children: State Funding Needed for Independent Counsel Representing Children in Juvenile Court*, 1 J. Center for Child. & Cts. 45, 49 (1999). Recent research by the Children and Youth Advocacy Clinic at the University of Washington School of Law illustrates the difference when an attorney is appointed to represent the child: children who were represented by an attorney along with a CASA have their preferences relayed to the court 84 percent of the time, while children represented only by a GAL or CASA have their preferences relayed only 19% of the time. Children and Youth Advocacy Clinic, *Defending Our Children: A Child's Access to Justice in Washington State*, 17 (August, 2016). Moreover, from a child's perspective, the proceeding is rife with impenetrable jargon and procedure, and she has few opportunities, or none, to ask questions, offer opinions, or be told her rights. The complexity of dependency proceedings, their adversarial nature, and the improbability that an attorney for the State or a parent will represent the

interests of the child all demonstrate the need to appoint counsel for the child in a dependency proceeding.

There is an additional problem with the State's failure to require appointment of counsel for children in dependency proceedings. Because there are no clear standards governing when counsel will be appointed, appointment policies and practices vary widely from county to county. In fact, it is impossible to determine if there are policies, both because judges, like the judge in this case, routinely interpret the statute as providing essentially unfettered discretion in deciding whether to appoint counsel, *see* RP 31, 33, Oct. 12, 2015, and because the statutory scheme does not require judges to issue findings to support denial of counsel. As a result, widespread and arbitrary geographic disparity persists, which denies equal justice to children across the state.

A. A Significant Divergence of Interests Prevent Parents from Advocating for a Child's Interests

A child's liberty interest in dependency proceedings may be markedly different from the interests of other parties. Here, the trial court found that SKP's interests were "aligned with the interest of her mother, with whom [she] resides," and were "adequately safeguarded by her mother and the guardian ad litem," The court held that "[b]alancing the *Mathews* factors, [SKP's] interests are in line with her mother's interests

and therefore the risk of error is minimal," and that the case did not "present the extreme circumstances that would necessitate the appointment of counsel for the child." CP 340-42.

The court's findings contrast with statements made at the hearing by SKP's mother, Ms. C. She advised the court that she supported appointment of counsel for SKP, because she was in an "untenable situation": On one hand, SKP had made it clear she did not want to visit her father, she was wetting the bed before seeing her father, and she was having behavior problems at school; on the other hand, Ms. C was "reluctant to advocate" for ending or restricting visits, because when she raised the issue, she was accused by the other parties of coaching her child. RP 22-23, Oct. 12, 2015.

This notion that SKP's and her mother's interests were in alignment because SKP was living with her mother, as she wanted to, ignores the inherent structural conflicts of interests between parents and children in the dependency context. The Supreme Court recognizes that a "child's liberty interest in a dependency proceeding is very different from, but at least as great as, the parent's." *In re MSR*, 174 Wn.2d at 17-18. While a parent's interests of "custody, care, and nurture of the child" are at risk in a dependency, the child faces the risk of losing not only a parent, but also relationships with siblings, grandparents, and other extended

family. *Id.* at 15. And unlike her parent, the child in a dependency "may well face the loss of physical liberty," as well. *Id.* at 16. The child's interests also include being free from the risk of harm, whether that risk stems from placement outside the parents' home or from being returned to the custody of neglectful or abusive parents. *Id.* at 17-18.

For these and other reasons, many courts recognize that "there is an inherent conflict of interests between the child and his or her parent, guardian, or custodian, which requires appointment of separate counsel for the child." *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1358-59 (N.D. Ga. 2005). This conflict manifests itself in numerous contexts, from parents who fail to appear at hearings, to those who do not want to believe a child's allegations of abuse, to those who have their own battles to fight, such as addressing drug or alcohol abuse issues, and many others. *See, e.g.*, Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 685 (2006) (explaining why children cannot rely on their parents to raise issues that are of priority to the child in dependency cases).

SKP's situation demonstrates these conflicts of interests. Her mother failed to advocate or move for SKP to visit or have contact with her half-siblings or her half-siblings' grandparents (with whom SKP had bonded), and she supported the visits between SKP and her father, despite

knowing that SKP was afraid to visit him. RP 23, 25, Oct. 15, 2016. SKP was left without any advocate at all in the proceedings.

1. A Parent Who is Absent or Lacks Information Cannot Advocate on Behalf of the Child

Attorneys control the flow of information in any legal proceeding and a court's decision can only be as good as the information it can access. Walter, *supra*, at 49. A parent's absence from a dependency hearing materially impinges on the interests of the child by limiting both the information available to the court and the parent's ability to advocate for the child. These situations can expose the child to increased risk of harm where, for example, the parent is aware that the child is being treated with psychotropic medications as part of mental health treatment, but fails to appear for a review hearing, and no other participant has investigated whether the child's treatment is voluntary and appropriate. Or, as recounted in Pitchal, *supra*, children who desperately want to escape foster care and have an aunt who can provide them a stable home near extended family are likely to find that no one involved in the dependency system will take their proposal seriously, unless the children have their own counsel appointed to represent them. Pitchal, *supra*, at 663-65.

A parent may also simply lack the basic information or otherwise be unable to inform the court of the child's well-being. Where a parent is

absent he or she cannot inform the court about the child's needs. Walter, *supra*, at 49. Similarly, if a child has already been removed from the home, the parent may be "unaware of how his or her child is doing in out-of-home care and cannot know whether or not the child's physical and emotional interests are being met, and thus cannot assert them." *Id.* And for reasons explained below, a parent may be ignorant of or ignore problems in his or her own home. In SKP's case, for example, her mother was initially allowed only supervised visits with SKP, which may have made it difficult for Ms. C to learn or understand what was most important to SKP. CP 12. Whether the child is allowed to live in the parent's home or is placed elsewhere, she needs an advocate who has no competing interests involved in her case and focusing on her needs. Walter, *supra*, at 49.

Parents with disabilities are disproportionately involved in the child welfare system, and due to pervasive bias, "societal prejudices, myths, and misconceptions" concerning their parenting abilities, these parents are far more likely that non-disabled parents to have their children removed from the home. Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, 90 (2012). *See generally id.* at 90-99. "Removal rates where parents have a psychiatric disability have been found to be as high as 70 percent to 80

percent; where the parent has an intellectual disability, the rates range from 40 percent to 80 percent." *Id.* at 92. This case fits the same pattern: Ms. C is disabled, experiences both psychiatric and intellectual disability issues. CP 69. Misconceptions that a parent with a psychiatric diagnosis is dangerous or that a parent with an intellectual disability will eventually mistreat her child, as well as that any parenting deficiency is irremediable, contribute to the very high rates at which children are removed from the homes of disabled parents. *Id.* at 92-94. In these situations, systemic and unfounded bias interferes with the parent's ability to effectively advocate for the child's interests.

2. A Parent Who is Accused of Abuse or Neglect Has a Conflict of Interest with the Child

A parent accused of abusing or neglecting a child is in a state of irreconcilable conflict with the child; their interests are directly opposed, and counsel must be appointed for the child to avoid an erroneous outcome. *Matter of Jamie TT*, 191 A.D.2d 132, 136, 599 N.Y.S.2d 892 (1993). In *Jamie TT*, the child alleged that her adoptive father had sexually abused her over a period of years. The trial court found that it was unable, subjectively, to determine whether the child or the adoptive father was telling the truth. It therefore ruled that the child had failed to meet the statutory burden by proving the allegations of abuse by a

preponderance of the evidence. *Id.* at 134. On appeal, the court noted that the trial court's "exoneration" of the adoptive father meant he regained the primary right to custody of the child, superior to third parties. *Id.* at 135. The court reversed, finding that the child's case was severely undermined by the passive role taken by her law guardian, who failed to call available witnesses to the child's out-of-court statements, failed to explore using an expert witness to corroborate the child's testimony, and who declined to conduct any cross-examination of the adoptive father at all. *Id.* at 137-38.

These facts may seem egregious, but in Washington, a parent accused of abuse, but not yet found to be abusive would also have preferential custody rights. *See* RCW 13.34.020 ("the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized").

The situation is no less serious when a child lacks the resources, access, or ability to inform the court, a CASA, or others of abuse or other problems at home. The court has a significant need to know how a child is doing even when the child is still at home. But "[w]ithout an independent attorney who will investigate whether or not the child is safe at home and has the necessary services or family support to safely remain at home, the court is severely limited in receiving accurate information from the parent's attorney." Walter, *supra*, at 49. In short, the parent's interest in

preserving parental rights and being found to be a competent parent may conflict with the child's interests.

In other situations, a parent may not effectively advocate for the child's interest because the parent does not believe, or does not want to believe, the child's reports of abuse by another family member. For example, a mother might discredit her child's allegations that her step-father, the mother's spouse, is sexually abusing her. The factual scenario here was somewhat similar, in that SKP was initially removed from her home along with her half-siblings after the discovery that one of SKP's half-siblings had been sexually abused by Ms. C's boyfriend. CP 33. Ms. C, however, appears to have believed, at least initially, that the abuser was a family friend, not her boyfriend. *Id.* This belief might have influenced her position on advocating for SKP's desire to be in contact with her half-siblings.

There are many possible motivations for a child's mother's reticence: anger toward the child, perception that the child is acting out, fear of losing her partner, or fear of confronting her partner. For a variety of reasons, many parents "are hesitant or afraid to openly discuss the needs of their children, as doing so might cause them to publicly air their own perceived failures as parents." Randi Mandelbaum, *Revisiting the*

Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers, 32 Loy. U. Chi. L.J. 1, 55 (2000).

In cases where the mother has children with the step-father, she is faced with a particularly difficult dilemma: if she believes her child's allegations of abuse, she may lose her spouse and her other children; if she chooses to side with her spouse, she must implicitly or explicitly discredit her child's abuse allegations. In the latter case, a mother may attempt to separate the child alleging abuse from her siblings, or she may try to persuade others the child is lying and therefore a bad influence on the other children. In this conflict framework, the parent may advocate for a placement and visitation outcome that is directly at odds with the child's interest, as recognized by the legislature, in maintaining familial relationships. *See* RCW 13.34.020; RCW 13.34.130(1)(b)(iii) (granting DSHS authority to consider placing the child "with a person with whom the child's sibling or half-sibling is residing"); RCW 13.34.130(6) (directing the court to presume that placement, contact, or visits with siblings is in the interest of the child). The Supreme Court has addressed this factual scenario in the parentage context. *See In re Parentage of M.F.*, 168 Wn. 2d 528, 536, 228 P.3d 1270 (2010) (Chambers, J. dissenting) (describing child's disclosure of alleged abuse by her mother's boyfriend to child's therapist and step-father, mother's subsequent decision to pull

the child from therapy, and mother's opposition to ongoing relationship with step-father). A parent accused of abuse or neglect is in conflict with the child's interests in dependency proceedings.

3. Family Conflict Can Prevent Parents from Advocating for the Best Placement Options for the Child

In some cases, each parent might be so adamantly opposed to the other parent's involvement in the child's life that neither can effectively advocate for the child's interests. For example, where each parent is hostile towards the others' relatives, both may try to keep the child from placement with those relatives, and try to prove the unsuitability of each other's families. Numerous courts have recognized that this situation requires the appointment of counsel in the custody context. *See, e.g.*, *J.A.R. v. Superior Court*, 179 Ariz. 267, 877 P.2d 1323, 1331 (Ct. App. 1994) (competing allegations of endangerment by both parents entitled child to be represented by independent attorney); *G.S. v. T.S.*, 23 Conn. App. 509, 582 A.2d 467, 470 (1990) (holding that "[w]hen custody is contested and there are allegations of neglect and abuse, children have a unique need to be represented by counsel who will advocate their best interests"); *Levitt v. Levitt,* 79 Md. App. 394, 556 A.2d 1162, 1167 (1989) (holding that where parents presented only their own interests in change of custody proceeding, their five-year-old child needed independent counsel).

This advocacy, of course, is inconsistent with the statutory preferences for placement within the family, for maintenance of familial relationships, and for stable and permanent placement. *See*, RCW 13.34.130(1)(b)(iii); RCW 13.34.130(6); RCW 17.13.290(1) (fewest possible placements should be made). In these situations, the child's attorney, free of the parents' biases, is able to advocate for placement with a relative that best serves the interests expressed by the child.

4. A Parent May be Opposed to Unique Legal Interests of the Child

Children have legal interests that a parent may not consider important or may oppose outright. For example, a non-Indian parent may not advocate for an Indian child's unique rights where the child's Indian heritage is derived from the other parent. Although a court may not remove an Indian child from her home absent clear and convincing evidence that staying in the home of the Indian parent is likely to result in serious harm to the child, RCW 13.34.130(1)(b)(i), the non-Indian parent may allege the situation is harmful, whereas the child may disagree or may want to maintain her link to Indian family members regardless. Similarly, when placing an Indian child in foster care, a court must give preference to the child's family, a tribe-licensed foster home, or an Indian foster home licensed by the state. RCW 13.38.180. Again, a parent who does not value

or share the child's connection to her Indian culture may oppose such placement, in contravention of the child's legal interests. Finally, a child may be entitled to tribal enrollment and corresponding significant social welfare benefits, but the non-Indian parent may oppose such enrollment.

In the immigration context, a parent may oppose dependency findings that could potentially result in immigration relief for the child. For example, a non-citizen child is entitled to seek permanent residence through "Special Immigrant Juvenile Status," if the child is under the jurisdiction of a juvenile court (including a dependency court) and the child cannot be reunited with at least one of his or her parents due to abuse, neglect, abandonment, or some similar ground. INA § 101(a)(27)(j), 8 U.S.C. § 1101(a)(27)(j). Similarly, under the Violence Against Women Act of 2000, a non-citizen child may seek permanent residence status if she was abused by a citizen or permanent resident parent. INA § 204(a)(1)(A), 8 U.S.C. 1154(a)(1)(A). Just as in other cases where abuse or neglect is alleged, the parent's interest in being deemed a fit parent are incompatible with the child's interest in pursuing immigration relief. *See, e.g.*, *Matter of Jamie TT*, 191 A.D.2d at 136 (explaining that the child's "interest in procedural protection was heightened because of the irreconcilably conflicting positions of her and her parents" in a case involving the alleged sexual abuse of the child by

her adoptive father); *In re Clark*, 90 Ohio Law Abs. 21, 23, 185 N.E.2d 128, 130 (Lucas Cty. Ct. C.P., 1962) (noting that "[o]ne does not have to work in family court very long to learn that in countless circumstances a juvenile's rights and interests . . . are at sharp variance with those of his parents.) An independent attorney for the child in one of these situations is able to advocate for immigration or other appropriate relief, something a parent may be unable or unwilling to do.

B. The Lack of Statewide Standards for Appointing Counsel Results in a Denial of Justice

Dependent children possess significant rights, including the right "'to be free from unreasonable risks of harm ... and a right to reasonable safety,'" as well as the right to "basic nurturing, including a safe, stable, and permanent home. *In re MSR*, 174 Wn.2d at 243 (quoting *Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003)). As the Supreme Court explained in *Braam*, however, the opportunity for dependent children to enforce these and other rights arises solely "in the context of dependency actions," *Braam*, 150 Wn.2d at 712. Appointment of counsel for children in dependencies would enable them to protect and exercise their rights.

Washington lacks a statewide structure for appointment of counsel. State law "fails to guarantee counsel to any child involved in an ongoing dependency proceeding and provides unfettered discretion to the courts to

decide whether children get counsel," with certain narrow exceptions.[1] Erin Shea McCann & Casey Trupin, *Kenny A. Does Not Live Here: Efforts in Washington State to Improve Legal Representation for Children in Foster Care*, 36 Nova L. Rev. 363, 365 (2012). Aside from these particular situations, however, courts have enormous discretion in determining whether to provide an attorney for the child in a dependency, and no standards to guide the exercise of that discretion. This has resulted in statewide disparity in attorney appointment practices. Washington State Office of Civil Legal Aid (OCLA), *Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State,* 6 (2008).

In the absence of a statutory guidance, counties have taken varied approaches resulting in substantial differences in appointment practices for children in dependency cases. The Office of Civil Legal Aid (OCLA) studied this issue in 2008 at the request of the State House Judiciary Committee, and found "little consistency in perceptions relating to the practice of appointment of counsel." Washington State Office of Civil

[1] Two longstanding situations in which the court must appoint counsel for the child are (a) when a child does not have a guardian ad litem and a party raises the issue or the court raises it on the court's initiative, Wn. R. Juv. Ct. 9.2(c)(1); and (b) when a child who is at least twelve years old seeks to reinstate his or her parents' rights after at least three years have passed since the parents' rights were terminated, RCW 13.34.215(3). In 2014, the legislature amended the law to provide counsel must be appointed for a child in a dependency proceeding six months after parental rights are terminated, if the child then as no remaining parent with parental rights. RCW 13.34.100(6)(a).

Legal Aid (OCLA), *Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State,* 7 (2008) (hereafter "OCLA Study"). The study results suggested there is no universal standard for determining when or whether to appoint counsel, and "no discernable basis for decision-making in this area either statewide or in the counties." *Id.* at 9. Nothing in case law or the academic literature suggests the situation has changed in the years since 2008.

The OCLA Study found significant geographical disparity in the appointment of counsel: in some counties, children above certain ages are appointed counsel in almost every case, while in other counties, very few or no children receive appointed counsel.[2] One judge opined that "[t]here seem to be two models for adolescent representation: 'almost always' and 'almost never.'" *Id.* at 5. Thus, whether a child receives legal counsel depends largely on where the child lives, not on an evaluation of objective criteria about the case or an assessment of the benefit to the child.

IV. Conclusion

Children should not be denied the assistance of a lawyer in a process that will determine where she will live and with whom, who

[2] For example, the OCLA study found that adolescents above age 12 (in King County) or children above age 8 (Benton-Franklin Counties) are almost always appointed counsel in dependency and TPR proceedings. *Id.* at 6. In many other counties, however, adolescents are appointed counsel in less than one-third of the cases. *Id.* at 6

among her family she will be with, whether and how she will access her culture, where she will attend school, and almost every other aspect of her childhood. A child's parents cannot rationally realistically be expected to advocate for what the child wants in a dependency. The interests of parent and child conflict because the parent may not actively participate, may not know what the child wants, or may have practical and legal interests that are diametrically opposed to those of the child. The Supreme Court recognizes that the "child's liberty interest in a dependency proceeding is very different from, but at least as great as, the parent's." *In re MSR*, 174 Wn.2d at 17-18. Surely the child's interests needs the same level of protection. This court should find that children in dependency cases have a right to counsel.

DATED this 19th day of August, 2016.

Respectfully submitted,

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IN THE COURT OF APPEALS
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DIVISION II

In re the Dependency of S.K.P., Minor Child,	)	Case No. 48299-1-II
Appellant.	)	CERTIFICATE OF SERVICE

Amanda Lee declares under penalty of perjury that the foregoing is true and correct under the laws of the State of Washington. I served via e-mail the following:

- Motion of Washington Defender Association for Leave to File *Amicus Curiae* Brief
- Brief of *Amicus Curiae* Washington Defender Association

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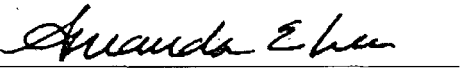
Dated this 19th day of August, 2016.



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